THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J u d g e m e n t
on Behalf of the Republic of Latvia
in Case No. 2015-19-01
on 29 April 2016, Riga

The Constitutional Court of the Republic of Latvia comprised of: chairman of the court hearing Aldis Laviņš, Justices Kaspars Balodis, Gunārs Kusiņš, Uldis Ķinis, Sanita Osipova and Ineta Ziemele,

having regard to a constitutional complaint submitted by Ringolds Meļķis and Ivars Straume,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17(1), as well as Section 19^2 and Section 28^1 of the Constitutional Court,

at the court hearing of 30 March 2016 examined in written procedure the case

"On Compliance of the First, Third and Fifth Part of Section 657 of the Criminal Procedure Law with the First Sentence in Article 92 of the Satversme of the Republic of Latvia".

The Facts

1. On 21 April 2005 the Saeima adopted the Criminal Procedure Law, which entered into force on 1 October 2005. The first part of Section 657 of the

Criminal Procedure Law provides: “A public prosecutor has the right to renew criminal proceedings in connection with newly disclosed circumstances.” The third part of this Section, in turn, provides that that an application regarding newly disclosed circumstances is examined by a public prosecutor according to the location of the adjudication of the initial criminal proceedings. The aforementioned norms of the Criminal Procedure Law have not been amended and are in force in the initial wording thereof.

The fifth part of Section 657 of the Criminal Procedure Law initially provided: “If a public prosecutor refuses to renew criminal proceedings in connection with newly disclosed circumstances, he or she shall take a reasoned decision on this refusal and notify the applicant thereof, by sending a copy of the decision to such applicant and explaining his or her rights to appeal such decision.”

By Section 312 of the law of 12 March 2009 “Amendments to the Criminal Procedure Law” , the words in the fifth part of Section 657 “ to appeal such decision” were replaced by a number and words “within 10 days from the day of the receipt to appeal the decision to a higher-ranking public prosecutor, the decision of which shall not be subject to appeal.”

Since 1 July 2009, when the law of 12 March 2009 “Amendments to the Criminal Procedure Law” entered into force, the fifth part of Section 675 of the Criminal Procedure Law has not been amended and is force in the following wording: “If a public prosecutor refuses to renew criminal proceedings in connection with newly disclosed circumstances, he or she shall take a reasoned decision on such refusal, and notify the applicant thereof, by sending a copy of the decision to such applicant and explaining his or her rights to appeal such decision within 10 days from the day of the receipt to a higher-ranking public prosecutor, the decision of which shall not be subject to appeal.”

2. **The applicants – Ringolds Meļķis and Ivars Straume** (hereinafter – the Applicants) – hold that the first, third and fifth part of Section 657 of the Criminal Procedure Law (hereinafter also – the contested norms) are incompatible with the

first sentence in Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Applicants had submitted an application requesting renewal of criminal proceedings in connection with newly disclosed circumstances (hereinafter– application regarding newly disclosed circumstances) to Riga City Latgale Suburb Prosecutor's Office. The deputy chief prosecutor of Riga City Latgale Suburb Prosecutor's Office adopted a decision to refuse renewing criminal proceedings in connection with newly disclosed circumstances. The Applicants had appealed this decision. The Applicant's complaint was rejected by a decision by the chief prosecutor of Riga City Latgale Suburb Prosecutor's Office, and the decision by the chief prosecutor is not subject to appeal.

The first sentence of Article 92 of the Satversme is said to protect a number of interconnected rights and principles: the right to an effective legal remedy, the principle of equal opportunities, the principle of justice and of procedural fairness. The concept "his or her rights and lawful interests", included in the first sentence of Article 92 of the Satversme, is said to be broader than the right to a fair trial envisaged in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) in connection with "validity of charges that have been brought". Therefore the requirements that the concept of a fair trial sets for the procedure of hearing a criminal case in general should be applied also to hearing a case in connection with newly disclosed circumstances. An effective legal remedy should be independent and unbiased – not only in the hierarchic and institutional, but also in the practical sense.

The functions of bringing charges and administration of justice should be strictly separated in criminal proceedings. A judicial control over a prosecutor's decisions is necessary in issues that have a significant impact upon a person's rights. In those cases, when a prosecutor has to decide on an application requesting renewal of criminal proceedings in connection with circumstances indicated in Para 3 of Section 655(2) of the Criminal Procedure Code, he has to assess a person's guilt in committing a criminal offence. Pursuant to the principle

of separating procedural functions, only the court could adopt the final decision on a person's guilt in committing a criminal offence. Therefore, examination of an application regarding newly disclosed circumstances pertains to the function of administration of justice and should be subjected to judicial control.

Usually in the stage of investigation an investigator is in charge of criminal proceedings, but in some cases a prosecutor may also be in charge of the proceedings. In such cases the same prosecutor, within the framework of the same criminal proceedings may fulfil the functions of investigation, of criminal prosecution and of brining the charges, and the actions of this prosecutor are controlled by a higher-ranking prosecutor, i.e., the chief prosecutor of the respective prosecutor's office. A prosecutor, who has been in charge of the pre-trial criminal proceedings and brought public charges, must be convinced of a person's guilt in committing the criminal offence. Whereas in examining an application regarding newly disclosed circumstances, a prosecutor must verify the validity of the charges that were brought previously, therefore, in deciding upon this issue, he cannot be considered to be sufficiently neutral and objective. Allegedly, the contested norms prohibit transferring into judicial control a prosecutor's decision and consequently restrict the Applicant's rights defined in the first sentence of Article 92 of the Satversme.

It is contended that the contested norms entrust the final control over the decision to refuse renewal of criminal proceeding to a higher-ranking prosecutor, who had to supervise the course of the criminal proceedings to be renewed. A procedure like this does not ensure adoption of an independent and unbiased decision, moreover, it is said to be incompatible with the principle of equal opportunities, since it grants significant advantages to one "party" of criminal proceedings – the one brining charges, *vis-à-vis* the person, who submits an application regarding newly disclosed circumstances. The contested norms are said to restrict also the Applicants' right to a fair outcome of criminal proceedings that follow from the principle of justice, as well as the basic rights that are guaranteed by the principle of procedural fairness.

The Applicants do not have at their disposal information that the contested norms had not been adopted in due procedure. The procedure established by the contested norms could have the purpose of abiding by *res judicata* principle. Thus, it can be assumed that the legitimate aim of the restriction upon fundamental rights established by the contested norms is protection of other persons' rights. However, the contested norms are said to be inappropriate for reaching this legitimate aim, since they do not ensure that criminal proceedings are renewed in all cases that have newly disclosed circumstances.

The legitimate aim of the restriction upon fundamental rights could be reached by a number of other measures, less restrictive upon a person's rights and lawful interests. If a decision on newly disclosed circumstances is examined by a prosecutor, then the prosecutor's decision can be transferred for judicial control. It could be defined that an application like this is not examined by a prosecutor according to the location of adjudication of initial criminal proceedings, but by a prosecutor of another prosecutor's office. An application regarding newly disclosed circumstances could initially be examined by a court or by a judge. Examination of the application also could be transferred into the competence of an institution, which is fully independent both from the prosecutor's office and the court, envisaging or not envisaging judicial control over the decisions by this institution. The contested norms should ensure a fair balance between the principle of legal stability and the principle of justice. Allegedly, the contested norms do not ensure this, therefore the restriction upon a person's fundamental rights that have been established thereby cannot be justified by greater public benefit.

The Applicants, after acquainting themselves with case materials, repeatedly underscore: the procedure established by the contested norms does not ensure that a sentenced person's application regarding newly disclosed circumstances is examined in an independent and unbiased way. Allegedly, regulation established in the contested norms cannot be justified by the need to prevent overloading of court. Moreover, the principle that an application regarding newly disclosed circumstances is examined by a prosecutor according

to the initial location of reviewing criminal proceedings, cannot be substantiated by practical considerations.

3. The institution, which adopted the contested act, – **the Saeima** – holds that legal proceedings in the case should be terminated since the contested norms do not infringe upon the Applicants' right to a fair trial.

The Saeima provides legal substantiation, insofar procedure established by the contested norms is applied to a person's application regarding newly disclosed circumstances in the meaning of Para 3 of Section 655(2) of the Criminal Procedure Law.

3.1. The first sentence of Article 92 of the Satversme is said to comprise the right to an effective legal remedy, insofar a person's claim should be examined by an independent judicial institution. In other instances this right is provided for by the third sentence in Article 92 of the Satversme. An application regarding newly disclosed circumstances cannot be regarded as part of initial or renewed criminal proceedings. An application like this is to be equalled to an application regarding initiation of criminal proceedings. In both cases a person requests examining in criminal procedure an issue of probable violation of his rights. However, prior to initiation of criminal proceedings a person has no criminal procedural status and, thus, no guarantees or rights that follow from this status.

Allegedly, the guarantees for the right to fair trial are not applicable to an application regarding newly disclosed circumstances. The right to an effective legal remedy, enshrined in the third sentence of Article 92 of the Satversme and Article 13 of the Convention is said to apply to examination of an application like this. Allegedly, the procedure for examining a persons application regarding newly disclosed circumstances, established in the contested norms, does not fall within the scope of the first sentence in Article 92 of the Satversme. In view of the fact the Applicants have not contested compliance of the contested norms with the third sentence in Article 92 of the Satversme, legal proceedings in the case under examination should be terminated.

3.2. However, if it were recognised that the right to an effective legal remedy falls within the scope of the first sentence in Article 92 of the Satversme, the Saeima notes that the contested norms ensure an effective legal remedy and comply with the first sentence in Article 92 of the Satversme.

It is contended that the right to an effective legal remedy does not always demand a possibility to turn to court. Article 13 of the Convention is said to guarantee accessibility of legal remedies on the national level, which allows protecting the rights and obligations defined in the Convention in any form envisaged in national regulatory enactments. In the case under examination, it should be established, whether the legislator has chosen an effective legal remedy for examining an application regarding newly disclosed circumstances. Effectiveness is said to be assessed by verifying, whether, within the framework of the national system for rights protection, an individual has possibilities to use legal remedies and whether a competent institution exists, which has the right to decide on compensation for an individual, in case his rights have been infringed upon. Renewal of criminal proceedings in connection with disclosure of new circumstances is said not to be directly linked to exercise of a person's fundamental rights, therefore lower requirements should be defined for the procedure established by contested norms compared to the ones that are to be set for legal remedies in case of an infringement upon fundamental rights.

The Saeima does not uphold the Applicants' opinion that a prosecutor, in examining an application regarding newly disclosed circumstances, adopts a final decision on a person's guilt for committing a criminal offence. Allegedly, a prosecutor only assesses, whether, indeed, newly disclosed circumstances exist and whether these are sufficient grounds for revoking a ruling made in a criminal case. If a prosecutor is convinced that such grounds might exist, he prepares a conclusion, which afterwards is examined by the Prosecutor General or a court. Thus, there are no grounds to consider that a prosecutor, by reviewing an application regarding newly disclosed circumstances, would perform the functions of a court.

The legislator, by defining what kind of information and facts are to be regarded as newly disclosed circumstances, has decreased the risk of arbitrariness in applying the norms of Chapter 62 of the Criminal Procedure Law. The prosecutor is said to have discretion in assessing circumstances referred to in Para 3 of Section 655(2) of the Criminal Procedure Law; however, the law sets limits for this discretion. Moreover, a prosecutor, in refusing to renew criminal proceedings in connection with newly disclosed circumstances, must adopt a reasoned decision. A higher-ranking prosecutor, examining a person's complaint about a decision to refuse renewal of criminal proceedings, is said to have the right both to revoke this decision and to decide, whether there are grounds for renewing criminal proceedings. Allegedly, there are no grounds to consider that a higher-ranking prosecutor in examining a complaint regarding a decision adopted by a prosecutor would be biased.

The Saeima, upon having acquainted itself with the case materials, notes that the summoned persons' opinions and other materials of the case under review confirm the validity of arguments and conclusions expressed in the Saeima's written response.

4. The summoned person – **the Ministry of Justice** – holds that the contested norms are incompatible with the first sentence in Article 92 of the Satversme.

The requirements that the concept of a fair trial sets for adjudication of a criminal case in general are to be applied also to adjudication of a case in connection with newly disclosed circumstances. Thus, criteria of unbiasedness and independence are applicable to this process. The function of renewing criminal proceedings is said to be that of solving the dispute between the principles of justice and legal stability. In searching for balance between these two principles one of the basic principles of criminal procedure should not be forgotten – the principle of procedural equality. The principle of procedural equality is said to be an important element in the right to a fair trial and a special

manifestation of the principle of legal equality, which is applicable to all categories of cases subject to a court.

The legislator has established two functions of the prosecutor's office: 1) Pursuant to Para 4 of Section 2 of the Office of the Prosecutor Law to maintain charges of the State; 2) pursuant to Para 6 of Section 2 of the Office of the Prosecutor Law to protect the rights and lawful interests of persons and the State in accordance with the procedures prescribed by law. In examining an application regarding newly disclosed circumstances, the prosecutor is said to fulfil the function defined in Para 6 of Section 2 of Office of the Prosecutor Law. In this case the need to assess and, if necessary, eliminate an infringement upon a person's right that has been caused by circumstances envisaged in Section 655(2) of the Criminal Law is to be recognised as the rights and lawful interests. Therefore the opinion that the issue of deciding on renewal of criminal proceedings at the prosecutor's office would be linked to the risk of violating the principle of unbiasedness and independence in all cases cannot be upheld.

In cases of administrative violations examination of applications regarding newly disclosed circumstances is subjected to two-stage judicial review. Although criminal liability is the most severe liability applicable to a person, the contested norms do not envisage judicial control over decisions adopted on the basis of an application regarding newly disclosed circumstances. From the systemic point of view, as well as that of human rights protection, this situation cannot be recognised as being appropriate. The legitimate aim envisaged by the contested norms could be reached by measures that are less restrictive upon a person's rights, i.e., by ensuring judicial control over decisions that refuse renewing criminal proceedings in connection with newly disclosed circumstances.

5. The summoned person – the Ombudsman of the Republic of Latvia – holds that the contested norms comply with the first sentence of Article 92 of the Satversme.

In situations, where a person's right to access to court does not follow from regulatory enactments, pursuant to the first sentence of Article 92 of the

Satversme, an alternative procedure, effective to the utmost, should be guaranteed to a person, providing the possibility to defend his rights in accordance with Article 13 of the Convention. Allegedly, the first sentence of Article 92 of the Satversme does not require that a person, in order to protect his rights and lawful interests that had been infringed upon, should turn only to the institutions of judicial power referred to in Article 82 of the Satversme. Pursuant to Article 13 of the Convention, effective protection of rights means also such legal remedies that give the possibility to identify and recognise a violation and to compensate for it. Thus, in the case under review, the first sentence of Article 92 of the Satversme is to be applied only insofar as the State's obligation to ensure to a person an effective mechanism for rights protection follows from it.

To establish existence of newly disclosed circumstances investigation must be conducted, therefore an application regarding newly disclosed circumstances should be submitted to a prosecutor and, allegedly, it is impossible to transfer such applications for initial examination to court. Likewise, the opinion that a prosecutor, in examining an application regarding newly disclosed circumstances, makes conclusions about a person's guilt or verifies the validity of charges that were brought previously cannot be upheld.

It follows from the principles of criminal procedure that the same prosecutor, who brought charges in criminal proceedings, may not examine an application regarding newly disclosed circumstances. Assuming that an application regarding newly disclosed circumstances is to be equalled to an application on initiating criminal proceedings, then legal regulation could be improved by establishing possibilities for appeal in the same scope as the ones set with regard to a decision on refusing to initiate criminal proceedings. However, the mechanism of appeal established in the contested norms is said not to be obviously disproportional.

6. The summoned person – **the Prosecutor's General Office** – holds that legal proceedings should be terminated, because the contested norms are not directly attributable to the first sentence in Article 92 of the Satversme.

The procedure for examining an application regarding newly disclosed circumstances cannot be identified with administration of justice in renewed criminal proceedings. Therefore, allegedly, regulation that Section 657 of the Criminal Procedure Law comprises cannot be attributed to the right to a fair trial included in the first sentence of Article 92 of the Satversme.

Upon receiving an application regarding newly disclosed circumstances, the chief prosecutor of the respective prosecutor's office issues a resolution to appoint a concrete prosecutor to examine this application. Usually, while the application is examined, materials of the criminal case are requested from the court, and after examining and comparing these with the facts included in the application a decision is taken on renewing criminal proceedings or refusal to renew criminal proceedings.

To establish, which institution or official should have the competence to examine an application regarding newly disclosed circumstances, the meaning and essence of newly disclosed circumstances, envisaged in Chapter 62 of the Criminal Procedure Law, should be understood. As Para 1, 2. 4 and 5 of Section 655(2) of the Criminal Procedure Law note, newly disclosed circumstances are rulings by competent institutions. Whereas the circumstances indicated in Para 3 of Section 655(2) of the Criminal Procedure Law essentially require that the prosecutor adopts the decision independently, on the basis of his conviction and laws, not influenced by other state institutions. The prosecutor is said to be the one, who must verify, whether newly disclosed circumstances exist in the case and whether, upon renewing the case, he will be able to perform obligations defined in Section 402, 408, 459 or 461 of the Criminal Procedure Law.

As regards examination of an application regarding newly disclosed circumstances, allegedly, there are no grounds to ignore the principle of territorial jurisdiction. To examine already known circumstances in interconnection with newly disclosed circumstances, territorial jurisdiction should be abided by, and such examination, if possible, should be conducted in the territory, where the particular criminal offence was committed. Whereas the fact that in practice an

application regarding newly disclosed circumstances is examined by the same prosecutor, who previously had been involved in the particular criminal case, does not mean a biased examination of the application. All requirements regarding inadmissibility of a conflict of interest apply also to this prosecutor. Moreover, two-stage examination within a prosecutor's office is to be recognised as being a sufficiently effective measure for adopting an objective decision.

7. The summoned person – the Latvian Council of Sworn Advocates (hereinafter – the Council of Advocates) – holds that the contested norms are incompatible with the first sentence in Article 92 of the Satversme.

The Council of Advocates does not uphold the Saeima's opinion that renewal of criminal proceedings in connection with newly disclosed circumstances is not directly linked to exercising a person's fundamental rights. The contested norms are said to establish a procedure, in which, possibly, a person, who has been sentenced for committing a criminal offence without basis, could be exonerated, if the prosecutor decides to renew criminal proceedings on the basis of this person's application. However, if the renewal of criminal proceedings is refused without basis, then a person's right to a fair trial is either infringed upon or actually substantially denied. Thus, the contested norms may infringe upon the rights granted to the Applicants in the first sentence of Article 92 of the Satversme.

The prosecutor, who has to examine an application regarding newly disclosed circumstances, and a higher-ranking prosecutor, who has to examine a complaint regarding the decision to refuse renewal of criminal proceedings, cannot be considered as being totally unbiased. The contested norms, in interconnection with regulation established in Para 3 of Section 655(2) of the Criminal Procedure Law, are said to create a situation, where a prosecutor, in examining an application regarding newly disclosed circumstances, provides his assessment on a person's guilt in committing a criminal offence.

Compliance of the contested norms with the first sentence of Article 92 of the Satversme is to be examined with regard to the final ruling, deciding on a

person's application regarding newly disclosed circumstances. I.e., the mechanism included in the contested norms could be regarded as being effective and legal only, if it were ensured that the final decision with regard to an application like this was adopted by a court.

The history of adopting the contested norms is said to be important in the case under review. In drafting the Criminal Procedure Law, the findings expressed in Para 10 of the Findings in the Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01 (hereinafter – also Case No. 2001-10-01) had not been taken into consideration, and the regulation of Section 390 of the Criminal Code of Latvian S.S.R. had been retained without basis.

Compliance of the contested norms with the first sentence in Article 92 of the Satversme should be analysed in interconnection with the regulation of Division 13 of the Criminal Procedure Code "Examination *De* Novo of Valid Judgements". Regulation of Chapter 62 and Chapter 63 of the Criminal Procedure Law is said to be aimed at eliminating infringement upon a person's rights without basis and ensuring a fair balance between the principles of legal stability and justice, as well as ensuring effectiveness of criminal justice. Chapter 63 of the Criminal Procedure Law subjects to judicial control a decision that has been adopted on the basis of a person's application for new examination of a criminal case due to substantial violation of substantial or procedural legal provisions. Whereas the contested norms, which are included in Chapter 62 of the Criminal Procedure Law, do not subject to judicial control a prosecutor's decision. Therefore the procedure established in the contested norms cannot guarantee the rule of law, legality and objectivity of the procedure for adopting a decision on renewing criminal proceedings in connection with newly disclosed circumstances. No legal substantiation can be provided for such major differences between regulations of Chapter 62 and Chapter 63 of the Criminal Procedure Law.

8. The summoned person – **professor of Riga Stradins University Faculty of Law *Dr. iur.* Sandra Kaija** – holds that the contested norms comply with the first sentence in Article 92 of the Satversme.

The Criminal Procedure Law is said to regulate adjudication of criminal cases in court, and *de novo* examination of valid rulings is envisaged as an additional possibility to ensure legality and validity of judgements. Several stages may be identified in the process of renewing criminal proceedings in connection with newly disclosed circumstances: 1) an application regarding newly disclosed circumstances: 2) activities by a prosecutor, upon receipt of the application; 3) *de novo* examination of the case in connection with newly disclosed circumstances (at the Prosecutor's General Office or at court). Newly disclosed circumstances are said not to follow from the materials of the already examined criminal proceedings. These may be new circumstances (for example, a judgement by the Constitutional Court, an opinion by an international judicial institution, etc.), as well as such that were newly disclosed, i.e., which had existed already during examination of case, but were not known or could not have been known to the court or the prosecutor. Moreover, these circumstances should be so significant that they could cause doubt about the legality and validity of a ruling that is in force. The assumption that a prosecutor, in assessing the newly disclosed circumstances, would necessarily be biased, is said to be wrong.

The issues of initiating criminal proceedings and of renewing criminal proceedings in connection with newly disclosed circumstances are said to have similarities. Both cases require a cause defined in law and grounds for adopting the respective decision. A prosecutor has limited authorisation in examining newly disclosed circumstances, since, in examining an application regarding newly disclosed circumstances, examination is conducted only within the scope to verify the existence of grounds for renewal and the need to conduct investigation in connection with newly disclosed circumstances. The case goes to court only then, when a prosecutor has adopted a decision on renewing criminal proceedings, has investigated newly disclosed circumstances, has recognised that grounds for revoking the ruling exist and has prepared a corresponding conclusion. The legislator has not envisaged a possibility for a person to turn immediately to court with an application regarding newly disclosed circumstances, because examination of an application like this at court, before

evidence has been collected, would create complications in the respective proceedings. However, the court decides on a prosecutor's conclusion, and in this stage a person may exercise his right to a fair court.

The procedure for examining an application regarding newly disclosed circumstances should not be assessed in the context of the first sentence of Article 92 of the Satversme, but is said to follow from Article 13 of the Convention. Allegedly, the contested norms do not prohibit a person to defend his rights and lawful interests in a fair trial, but define a procedure, in which a person's rights are to be exercised in particular cases. The legislator has ensured an effective mechanism of rights protection for examining an application regarding newly disclosed circumstances.

9. The summoned person –***Mg. iur.*** **Gunārs Kūtris, head of the Working Group of the Ministry of Justice for Drafting the Criminal Procedure Law** – holds that the contested norms do not infringe upon the right to a fair trial established in the first sentence of Article 92 of the Satversme, however, they could be examined in the context of the third sentence of this Article.

In the course of drafting the Criminal Procedure Law, there had been no discussions in the working group about regulation on renewal of criminal proceedings in connection with newly disclosed circumstances, because the group had supported adoption of the regulation of Chapter 32 of the former Latvian Criminal Procedure Code (hereinafter – CPC). There had been a number of reasons for this choice.

The previous regulation had been understandable, and there had been no problems in practice. Appellate and cassation instances function in Latvia, which help to eliminate possible errors in court rulings. The prosecutor's office belongs to the judicial power, and its main function is supervision of legality. The new Criminal Procedure Law reinforced objectivity of court and strictly separated procedural functions. I.e., a court may not decide on initiation of criminal proceedings or criminal prosecution, but examines the cases transferred to it and assesses the submitted materials. The procedure for clarifying newly disclosed

circumstances, in particular, in the case of Para 3 of Section 655(3) of the Criminal Procedure Law, includes mandatory verification. Conducting of such verification is said to fully comply with the functions of a prosecutor's office and the competence of a prosecutor. If every application regarding newly disclosed circumstances were to be examines at court, that would mean establishing one more instance of appeal and thus cause concern about legal stability.

The statement that the contested norms infringe upon the rights defined in the first sentence of Article 92 of the Satversme, is said to be questionable. Rather, in connection with the contested norms and the facts noted in the constitutional complaint, it could be examined, whether the right to an effective legal remedy in the meaning of Article 13 of the Convention had not been infringed upon. In Latvia, the content of this right is to be "read into" the third sentence of Article 92 of the Satversme. However, no arguments can be found as to incompatibility of the contested norms with Article 92 of the Satversme as a whole.

By providing that the prosecutor is the official, who examines an application regarding newly disclosed circumstances and adopts a decision on it, the legislator has found a reasonable solution. The prosecutor's objectivity in such examination of applications is said to be ensured by his functions, defined in the Office of the Prosecutor Law and his role in criminal proceedings as defined in the Criminal Procedure Law. Moreover, the newly disclosed circumstances are of the kind that were not known in the criminal proceedings examined previously, therefore the prosecutor has the opportunity to examine the already adjudicated criminal proceedings from another vantage point – that of legality. In this case the prosecutor acts as in all other criminal proceedings – deciding without prejudice on amending or revoking the charges. However, it would be inadmissible, if an application regarding newly disclosed circumstances were examined by the same prosecutor, who brought charges in the particular criminal proceedings, since in such a case at least an apparent conflict of interest might arise.

The Findings

10. Pursuant to the case law of the Constitutional Court, issues of procedural nature must be reviewed before examining constitutionality of legal norms on their merits (*see, for example, Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 11, and Judgement of 27 June 2013 in Case No. 2012-22-0103, Para 10*).

The contested norms establish a procedure for renewing criminal proceedings in connection with newly disclosed circumstances. The Constitutional Court has already examined compliance of similar regulation with the first sentence in Article 92 of the Satversme (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01*).

Thus, the Constitutional Court must verify, first of all, whether the claim of the case under review has not been already adjudicated.

10.1. In the judgement in Case No. 2001-10-01 the Constitutional Court examined compliance of CPC norms with the first sentence of Article 92 of the Satversme. In the case under review, however, compliance of norms of the Criminal Procedure Law with the same norm of the Satversme must be examined.

Hence, formally, the claim of the case under review has not been adjudicated, since it pertains to legal norms included in another regulatory enactment.

10.2. In cases, when the legislator has adopted amendments to a law to ensure compliance of a contested norms with the Satversme, but has not deleted from the law the text thereof, the Constitutional Court must clarify the scope of amendments that have been introduced and assess, whether the content of the contested norm has substantially changed (*see, for example, Decision of 3 April 2014 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2013-11-01, Para 10.1*).

The Constitutional Court holds that this finding should be applied to all cases, when it must be verified, whether the claim in the particular case has not been already adjudicated. I.e., if the legislator has included regulation, the

constitutionality of which was examined by the Constitutional Court, in another regulatory enactment, this *per se* is not the grounds for not attributing the new regulation to the provision of Para 4 of Section 20(5) of the Constitutional Court Law regarding an adjudicated claim. In such a case the scope of changes in the regulatory enactment must be assessed to establish, whether the content of the contested norms has changed substantially. Even if the legal regulation once examined by the Constitutional Court has been included in another regulatory enactment, it may have stayed substantially unchanged. Therefore interpretation and application of Para 4 of Section 20(5) of the Constitutional Court Law, as a result of which a case regarding an already adjudicated claim were to be heard, would be contrary to the principles of legal certainty and procedural economy.

Hence, the Constitutional Court must establish, whether the claim of the case under review has substantially changed.

10.3. The applicant in Case No. 2001-10-01 – the State Human Rights Bureau – requested the Constitutional Court to recognise as being invalid the exclusive right of a prosecutor to initiate legal proceedings in a criminal case in connection with newly disclosed circumstances and CPC Section 390–392^2 as being incompatible with Article 92 of the Satversme. Pursuant to CPC Section 396 a person submitted an application regarding newly disclosed circumstances to a prosecutor. If the prosecutor held that there were no reasons to initiate legal proceedings in a criminal case in connection with newly disclosed circumstances, he adopted a reasoned decision, and the person had the right to appeal against it to a higher-ranking prosecutor.

Pursuant to regulation included in the norms that are contested in the case under review, a person's application regarding newly disclosed circumstances is examined by a prosecutor according to the location of initial adjudication of criminal proceedings. If a prosecutor refuses to renew criminal proceedings in connection with newly disclosed circumstances, he adopts a reasoned decision, and the person has the right to appeal against it to a higher-ranking prosecutor. The decision by a higher-ranking official is not subject to appeal.

Thus, the legal regulation that is contested in the case under review substantially has not changed compared to the regulation contested in Case No. 2001-10-01.

10.4. However, the Constitutional Court has recognised that, if the facts of the case change substantially, the claim no longer can be considered as being adjudicated. Therefore, in some cases, having examined the facts of the case, the findings expressed in the previous judgement, as well as changes within the legal system and having established the existence of substantial new circumstances, the Constitutional Court may examine a claim that has been already adjudicated (*see, Judgement of 15 June 2006 by the Constitutional Court in Case No. 2005-13-0106, Para 10.1 and Para 10.3*).

It follows from the statements above that to verify, whether the claim of the case under review has not been already adjudicated, the Constitutional Court must also verify, whether new significant circumstances are not present in connection with which the claim could not be considered as a being already adjudicated.

10.5. The Constitutional Court in the judgement in Case No. 2001-10-01 recognised that the contested CPC norms were not to be considered as the most effective and the best possible option for solving the dispute between the principle of justice and the principle of legal stability. However, at the moment of passing the judgement, the balance between these two principles established by CPC had been distorted to the extent that the contested norms had to be recognised as being incompatible with the Satversme. The judgement noted, in addition: "… until CPC does not provide for any other procedure for new examination of a case, when newly disclosed circumstances exist, deleting the contested norms from CPC would create a situation that would make it difficult to examine case in this procedure at all. And that would be an even greater obstacle to exercising the principle of justice" (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 10 of the Findings).* At the same time this finding by the Constitutional Court indicated that the legislator, in drafting the new Criminal Procedure Law, must envisage a more effective

measure for ensuring balance between the principle of justice and the principle of legal stability.

10.6. Case No. 2001-10-01 was examined fourteen years ago, at the time when transformation of the Soviet law into law appropriate for a democratic state governed by the rule of law, where ensuring human rights is a fundamental value, was happening in Latvia.

Transformation into law appropriate for a democratic state governed by the rule of law was on-going also in criminal procedure. The Criminal Procedure Law was adopted on 21 April 2005. The contested norms cannot be examined in isolation from the general system of the Criminal Procedure Law. It must be taken into consideration that the Criminal Procedure Law was adopted to simplify and accelerate regulation of criminal law relationships, with the aim to ensure that human rights are respected (*see, also annotation to the draft law "Criminal Procedure Law" No. 286, submitted to the Saeima on 29 May 2003, accessible: http://www.saeima.lv*). Accordingly, it was provided in Section 1 of the Criminal Procedure Law that in reaching the purpose of criminal procedure, unsubstantiated interference into a person's life was inadmissible, and other principles were enshrined, for example, the principle of guaranteeing human rights, prohibition of torture and degrading treatment.

Moreover, with adoption of the Criminal Procedure Law, the scope of a prosecutor's rights and obligations in each particular stage of proceedings was changed, and the idea was implemented that in one criminal proceedings one prosecutor is involved, to the extent possible, initially as the supervising prosecutor, then as the person in charge of the proceedings and later as the one bringing charges. (*see also: Meikališa Ā., Strada-Rozenberga K. Kriminālprocesa dalībnieki. Rakstu kopas „Pārmaiņu laiks kriminālprocesā" 3. raksts. Grām.: Kriminālprocess. Raksti. 2005–2010. Rīga: Latvijas Vēstnesis, 2010, 75.–79. lpp.*).

Therefore, the changes in the legal system and legal regulation on criminal proceedings, made after the judgement in Case No. 2001-10-01 was adopted, are to be recognised as substantial new circumstances, therefore the

claim regarding compliance of the contested norms with the first sentence of Article 92 of the Satversme cannot be regarded as being already adjudicated. Thus, legal proceedings in the case must be continued.

11. The Saeima holds that legal proceedings in the case should be terminated, because the contested norms do not infringe upon the Applicants' rights defined in the first sentence of Article 92 of the Satversme. The summoned persons – the Prosecutor's General Office and G. Kūtris – also hold that the contested norms do not apply to the right to a fair trial included in the first sentence of Article 92 of the Satversme. Therefore to decide on the issue of terminating legal proceedings, the Constitutional Court must establish, whether the contested norms apply to such rights of the Applicants that fall within the scope of the first sentence of Article 92 of the Satversme.

12. The first sentence of Article 92 of the Satversme provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court."

12.1. It has been recognised in Case No. 2001-10-01 that, *inter alia*, the requirements that the concept of a fair trial advances for the procedure of examining a criminal case in general are applicable also to examination of a case in connection with newly disclosed circumstances (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 4 of the Findings*).

12.2. The concept of "a fair court", referred to in Article 92 of the Satversme, comprises two aspects, i.e. "a fair court" as an independent institution of the judicial power, which examines the case, and "a fair court" as a procedure appropriate for a state governed by the rule of law, in which this case is examined (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 17 January 2005 in Case No. 2004-10-01, Para 6*).

A fair outcome of legal proceedings, i.e., a fair judgement is an indispensable part of a fair trial. Procedural laws set out a number of requirements aimed at ensuring a fair judgement, for example, objectivity and neutrality of the

court, the principle of equality of parties, verification of evidence, the right to appeal against a ruling at an appellate instance court, and others. As the result of correct application of such requirements and interaction between them a fair judgement can be reached. A fair judgement must be valid and compatible with legal norms (*see, for example, Judgement of 4 February 2003 by the Constitutional Court in Case No. 2002-06-01, Para 3 of the Findings*).

To establish the meaning of Article 92 of the Satversme, it must be examined in connection with other norms and principles of the Satversme, *inter alia*, the principle of a state governed by the rule of law. Legal certainty is an essential element in the principle of a state governed by the rule of law (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 8 of the Findings, and Judgement of 11 April 2007 in Case No. 2006-28-01, Para 12*). *Res judicata* principle is one of the manifestations of the principle of legal certainty.

The Constitutional Court has recognised that *res judicata* principle forms the content of the right to a fair trial established in Article 92 of the Satversme. Pursuant to this principle nobody has the right to review a valid final judgement with the aim of achieving repeated adjudication of the case (*see Judgement of 9 January 2014 by the Constitutional Court in Case No. 2013-08-01, Para 7 and Para 17.3)*. In the meaning of Article 92 of the Satversme defending one's rights and lawful interests does not mean the right to endless legal proceedings, but, quite to the contrary, to proceedings that must be concluded within reasonable time with a valid judgement (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 5 of the Findings).*

12.3. It has been recognised in the case law of the Constitutional Court a number of times that the norms of human rights included in international human rights documents might interpret the right to a fair trial defined in Article 92 of the Satversme (*see, for example, Judgement of 3 June 2009 by the Constitutional Court in Case No. 2008-43-0106, Para 10*). On the level of constitutional law international norms of human rights and the practice of application thereof serves as a means of interpretation to establish the content and scope of fundamental

rights and the principle of a state governed by the rule of law, insofar this does not lead to decreasing or restricting fundamental rights that are included in the Satversme (*see, for example, Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings*).

It follows from the second part of Article 4 in Protocol 7 to the Convention that in some cases a repeated examination of a case is admissible, i.e., if there is evidence of new or newly disclosed circumstances or if significant errors had been made in the previous proceedings, which could have influenced the outcome of the case. Whereas the European Court of Human Rights (hereinafter – ECHR) has recognised in a number of cases that examination of a case *de novo* or, if a respective request has been submitted, renewing legal proceedings is to be considered as the most appropriate way to eliminate a violation of Article 6 of the Convention (*see, for example, Judgement by ECHR of 20 April 2010 in Case "Laska and Lika v. Albania", Applications No. 2315/04 and No. 17605/04, Para 74*).

Moreover, ECHR notes that in some cases renewal of legal proceedings allows eliminating in full an obvious violation of a person's right to a fair trial, for example, using in criminal proceedings evidence, which has been obtained by breaching the prohibition of torture or cruel treatment (*see, for example, Judgement by ECHR of 11 February 2014 in Case "Cēsnieks v. Latvia", Application No. 9278/06, Para 65 and 78*). This point is based upon the finding that the use of such evidence in criminal proceedings for verifying essential facts always causes serious doubts about the fairness of criminal proceedings as a whole and requires to consider these proceedings as a whole unlawful (*see, for example, Judgement by the Grand Chamber of ECHR of 1 June 2010 in Case "Gäfgen v. Germany", Application No. 22978/05, Para 66*).

Pursuant to Article 46 of the Convention every final judgement by ECHR in a case, where the respective member state is one of the parties, is binding upon member states. The enforcement of ECHR judgement is monitored by the Committee of Ministers of the Council of Europe. Para "b" of Article 15 of the Statute of the Council of Europe provides that the Committee of Ministers has the

right to adopt recommendations addressed to member state governments. Although these recommendations are not legally binding, they are adopted on issues that are recognised as being issues of the member states' common policy. On 19 January 2000 the Committee of Ministers of the Council of Europe adopted recommendation No. R (2000)2 "On the re-examination or reopening of certain cases at domestic level following judgement of the European Court of Human Rights" [*Recommendation No. R* (*2000*) *2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*].

In this recommendation the Committee of Ministers encourages member states to examine their legal systems to verify, whether they provide an appropriate possibility to re-examine cases (*inter alia*, by renewing legal proceedings) in those cases, where ECHR has recognised that the Convention has been violated, in particular in those cases, where: 1) the injured party continues to suffer very serious negative consequences because of the decision by a state institution, which violated the person's fundamental rights, which cannot be adequately remedied by paying compensation, and which cannot be rectified except by re-examination or reopening the case; 2) the ECHR judgement leads to the conclusion that a) the impugned domestic decision is on the merits contrary to the Convention; b) the violation of the Convention found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

It has been recognised also in legal literature that in those case where valid court rulings can be considered as being unfair, preference should be given to the principle of justice over the principle of legal certainty (*see, for example: Hoffmann R. Verfahrensgerechtigkeit. Studien zu einer Theorie prozeduraler Gerechtigkeit. Paderborn: Schöningh, 1992, S. 132–133*).

Thus, cases, where legal proceedings must be renewed in a case, in which the final ruling has been adopted, to ensure the right to a fair trial, are possible.

12.4. Submitting an application regarding newly disclosed circumstances, similarly to submitting a protest against a valid ruling due to a significant violation of substantive or procedural legal norms, cannot be considered as being an appeal and cannot be equalled to the right to turn to court (*compare: Judgement of 14 May 2013 by the Constitutional Court in Case No. 2012-13-01, Para 15.1*).

Renewal of criminal proceedings in connection with newly disclosed circumstances and re-examination of valid rulings due to significant violations of substantive or procedural norms are legal institutions, which have been created as additional guarantees for the right to a fair trial in a case provided for in law. The Constitutional Court has already recognised that the function of renewing criminal proceedings in connection with newly disclosed circumstances is to solve the conflict between the principles of justice and of legal stability, which both simultaneously follow from the idea of a state governed by the rule of law (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 8 of the Findings).*

Renewal of criminal proceedings in connection with newly disclosed circumstances is a special procedural stage, which is possible only if the grounds for it have been defined in law. After a ruling in a criminal case has entered into force, such circumstances may be disclosed that were not taken into account in examining the criminal case, because they were not known or could not have been known. In such cases to ensure a fair trial and an element thereof – a fair judgement, a possibility to rectify the committed injustice must be envisaged by renewing criminal proceedings, so that the newly disclosed circumstances would be taken into consideration in examining the criminal case. Whereas in those cases, where no grounds for renewing criminal proceedings in connection with newly disclosed circumstances can be established, to ensure a fair trail a possibility to refuse renewal of criminal proceedings should be envisaged, thus respecting the court's valid ruling and *res judicata* principle. This means that the purpose of legal institution – renewal of criminal proceedings in connection with

newly disclosed circumstances – is to ensure a balance if two elements of a fair trial – *res judicata* principle and a fair judgement – are in conflict.

Thus, regulation on renewing criminal proceedings in connection with newly disclosed circumstances, included in the Criminal Procedure Law, is to be examined within the scope of the first sentence of Article 92 of the Satversme and legal proceedings in the case must be continued.

13. The Applicants hold that the contested norms are incompatible with the first sentence of Article 92 of the Satversme, if a person's application regarding newly disclosed circumstances is examined by a prosecutor according to the initial location of examining the criminal proceedings and the person has no right to appeal against a prosecutor's decision to refuse renewal of criminal proceedings. Allegedly, an unfounded refusal to renew criminal proceedings in connection with newly disclosed circumstances denies a person the possibility to be exonerated from committing a criminal offence, which this person did not commit. I.e., the Applicants hold that a fair judgment is not ensured.

The legislator has broad discretion in selecting those measures that ensure a balance in case of a conflict between *res judicata* principle and a fair judgement (*compare: Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 8 of the Findings).* Various measures can be used to ensure this balance. Legal regulation of other states also points to this. In some countries an application regarding newly disclosed circumstances initially is examined by a court (for example, in Austria, the Netherlands, Slovakia), in other countries this application is examined by a prosecutor (for example, in Lithuania) or another independent institution (for example, in Denmark, Norway). In some countries the decision by a prosecutor or another institution may be appealed to a court (for example, in Lithuania, Norway). Moreover, some countries abide by the principle that the official (a prosecutor or a judge), who participated in the initial examination of the criminal case, is not allowed to examine an application regarding newly disclosed circumstances (for example, in the Netherlands, Slovenia, Finland). Whereas the case law of ECHR recognizes that if a person's right to a fair trial has been violated, a possibility to eliminate this violation, i.e.,

to achieve a fair judgement, should be guaranteed to the person (*see, for example, Judgement by the Grand Chamber of ECHR of 12 May 2005 in Case "Öcalan v. Turkey", Application No. 46221/99, Para 210*).

Thus, in the case under review, in order for the Constitutional Court to assess, whether the contested norms comply with the first sentence of Article 92 of the Satversme, it must establish, whether the regulation established by the contested norms ensures a balance in the case of a conflict between *res judicata* principle and a fair judgement.

14. Renewal of criminal proceedings in connection with newly disclosed circumstances is regulated in Chapter 62 of Division 13 of the Criminal Procedure Law "Examination *De Novo* of Valid Judgements". Section 655(1) of the Criminal Procedure Law provides that criminal proceedings, where a court judgement or ruling, or a public prosecutor's penal order has entered into force, may be renewed in connection with newly disclosed circumstances. The second part of this Section provides an exhaustive list of five grounds for renewing criminal proceedings in connection with newly disclosed circumstances or five types of newly disclosed circumstances, i.e.:

1) false testimony knowingly provided by a victim or witness, false findings or a translation knowingly provided by an expert, forged material evidence, forged decisions, or forged minutes of an investigation or court operations, as well as other forged evidence that has been the grounds for the rendering of an unlawful judgment has been recognized by a valid court judgment or public prosecutor's penal order;

2) criminal maliciousness by a judge, public prosecutor, or investigator that has been the grounds for the taking of an unlawful judgment has been recognised by a valid court judgment or public prosecutor's penal order;

3) other circumstances that were not known to a court or public prosecutor in rendering a judgment, and which, on their own or together with previously established circumstances, indicate that a person is not guilty or has committed a lesser or more serious criminal offence than the offence for which he or she has

been convicted or he or she has been applied a public prosecutor's penal order, or which testify regarding the guilt of an acquitted person or a person in relation to whom criminal proceedings have been terminated;

4) findings of the Constitutional Court regarding the non-conformity of legal norms, or an interpretation thereof, to the Constitution, on the basis of which a judgment has entered into effect;

5) the findings of an international judicial authority regarding the fact that a judgment of Latvia that has entered into effect does not comply with the international laws and regulations binding to Latvia.

Section 656 of the Criminal Procedure Law defines the term for renewal of criminal proceedings in connection with newly disclosed circumstances and the procedure for calculating thereof, whereas Section 657 regulates the way this procedure – renewal of criminal proceeding in connection with newly disclosed circumstances – is initiated.

Pursuant to Section 657(2) of the Criminal Procedure Law, persons involved in criminal proceedings or representatives thereof have the right to submit an application regarding newly disclosed circumstances. Whereas if in the course of other criminal proceedings information about any of circumstances defined in Section 655(2) of the Criminal Procedure Law is obtained, the prosecutor has the right to start verifying existence of newly disclosed circumstances on his own initiative [*see also: Kalnmeiers Ē. Prokurora darbības, atjaunojot procesu sakarā ar jaunatklātiem apstākļiem. Grām: Kūtris G.* (*zin. red.*) *Rokasgrāmata krimināl*procesā *prokuroriem. Rīga: Tiesu namu aģentūra, 2010, 259. lpp.*]. Thus, the issue of renewing criminal proceedings due to newly disclosed circumstances can be initiated both on the basis of applications by persons involved in criminal proceedings or representatives thereof, and upon the prosecutor's initiative. It follows from the case materials that the Applicants contest the procedure established by the contested norms for examining a sentenced person's application regarding newly disclosed circumstances (*see Case Materials, Vol. 4, p. 47).*

If a person involved in criminal proceedings wishes to achieve renewal of criminal proceedings in connection with newly disclosed circumstances, he must, in accordance with Section 657(3) of the Criminal Procedure Law, submit an application to a prosecutor according to the initial location of examining the criminal proceedings. Upon examining a person's application regarding newly disclosed circumstances, the prosecutor verifies, whether any of the grounds or newly disclosed circumstances defined in Section 655(2) of the Criminal Procedure Law can be established. If the prosecutor holds that no newly disclosed circumstances can be established, he adopts a decision to refuse renewal of criminal proceedings in connection with newly disclosed circumstances. Whereas, if the prosecutor is of the opinion that newly disclosed circumstances can be established, he conducts investigation in connection with these, prepares a conclusion and transfers the issue to be reviewed by court or – if a prosecutor's penal order has been applied to a person – to the Prosecutor's General Office,

Pursuant to Section 658^1 (1) of the Criminal Procedure Law, the decision on revoking a public prosecutor's penal order and renewing criminal proceedings is taken by the chief prosecutor of the Criminal Legal Department of the Prosecutor's General Office or the Prosecutor General. Whereas pursuant to Section 660(5), only the court has the right to decide on revoking a valid court's ruling and renewal of criminal proceedings, after the prosecutor has prepared a conclusion and submitted the corresponding materials. Considering that renewal of criminal proceedings is a special procedural stage, examination of a case in court in connection with newly disclosed circumstances is not conducted in the general procedure set for criminal cases, but in the procedure for examining cases in oral procedure before cassation court, with some exceptions that have been defined in Section 660 (4) of the Criminal Procedure Law.

Thus, the legislator has established the legal grounds for renewing criminal proceedings, the subjects, who have the right to initiate the issue of renewing criminal proceedings, corresponding procedural term, officials and institutions, who decide on the issue of renewing criminal proceedings in connection with

newly disclosed circumstances, as well as the procedure for deciding on such issues.

15. Before adopting the final decision on revoking a valid ruling and renewal of criminal proceedings in connection with newly disclosed circumstances, information that has been received is verified and newly disclosed circumstances are investigated. The prosecutor has a decisive role in this initial stage.

In Latvia the prosecutor's office is an institution of judicial power and pursuant to Section 106^1 (1) of the law "On Judicial Power" prosecutors are officials belonging to the system of courts. This status of the prosecutor's office has been created with the aim of ensuring to the prosecutor's office independence from the executive power, bringing the prosecutor's status as close to the judge's status as possible. On the one hand, the prosecutor's office is a united, three-stage system of institutions headed by the Prosecutor General, on the other hand, the functions of the prosecutor's office are performed independently and single-handedly by officials of the prosecutor's office, i.e., prosecutors (*see, Judgement of 20 December 2006 by the Constitutional Court in Case No. 2006-12-01 10, Para 12.1 and Para 12.2*).

The main task of the prosecutor's office as an institution of judicial power is to monitor compliance with law; therefore it has an essential role in ensuring the rule of law, *inter alia*, protection of persons' rights. It follows from Section 2 of Office of the Prosecutor Law that the legislator has defined two kinds for functions for the prosecutor's office: first, to supervise and conduct pre-trial investigation, initiate and conduct criminal prosecution, to bring public charges; secondly, in the procedure defined in law to protect the rights and lawful interests of persons and the State (*see also Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 7 of the Findings).*

Examination of a persons application regarding newly disclosed circumstances comprises verification, i.e., establishing: 1) whether the application complies with the requirements set for it (for example, whether the application is submitted by a person who has the right to do it, whether it has been signed,

whether the rules of jurisdiction have been complied with; whether the term for submitting an application has been complied with, the grounds established in law for renewal of criminal proceedings have been indicated, the necessary documents have been annexed, etc.); 2) whether the circumstances indicated in the application exist and whether these are credible: 3) whether these were not known previously; 4) whether these are significant; i.e., what their impact upon a valid ruling in criminal proceedings could be. The Supreme Court has indicated that not just any newly disclosed circumstance *per se* is the reason for revoking a valid ruling, but only such circumstance, which had been of decisive importance in adopting this ruling (*see, for example, Decision of 17 March 2016 by the Department of Criminal Cases of the Supreme Court in Case No. SKK-J-0141-16*). Therefore the opinion expressed by the summoned persons the Prosecutor's General Office and G. Kūtris can be upheld that such initial verification is necessary to conduct investigation and to obtain evidence. In criminal proceedings these functions are typical of the prosecutor, not of the court. That is why the prosecutor has been entrusted with conducting this verification. In view of the fact that the prosecutor, in examining a person's application regarding newly disclosed circumstances, acts with the aim of supervising that legality and a person's rights are complied with, the assumption that a prosecutor would undoubtedly be biased in assessing the newly disclosed circumstances is said to be unfounded (*see Case Materials, Vol. 3, pp.69, 77 and 127, as well as Volume 4, p. 20*).

The initial verification of a person's application at the prosecutor's office relieves courts from examining unfounded applications and thus ensures effectiveness of legal proceedings. Moreover, this initial stage of examination mainly allows verifying the existence of the grounds for renewal of criminal proceedings established in law.

Thus, the procedure established in the contested norms is aimed at achieving a balance in case of conflict between *res judicata* principle and a fair judgement.

16. The Applicants hold that the procedure established by the contested norms causes valid doubts about the prosecutor's neutrality, because the final decision on a person's application regarding newly disclosed circumstances is adopted by a prosecutor from the same prosecutor's office, which was in charge of the pre-trial criminal proceedings and brought public charges in court. Allegedly, it is not ensured that an application regarding newly disclosed circumstances is examined by a prosecutor, who did not bring public charges in the respective criminal proceedings.

A balance between *res judicata* principle and a fair judgement can be ensured, if criminal proceedings are renewed in connection with newly disclosed circumstances only in those case, where there are legal grounds for it; i.e., not all valid court judgments can be revoked in connection with newly disclosed circumstances, but only such that do not comply with the criteria of a fair judgement. The guarantee for a fair outcome of legal proceedings requires that a person should not be sentenced for a criminal offence, which he has not committed, and that a person, who has committed a criminal offence, were accordingly sentenced (*see also Judgement of 5 March 2002 in Case No. 2001-10-01, Para 8 of the Findings).*

16.1. If an official or an institution belonging to the branch of judicial power has been granted the right to decide, whether a person's application complies with legal requirements, then this official or institution, in adopting the decision, should be objective or neutral.

The Constitutional Court has noted that the guarantee of a court's objectivity or neutrality is an element in the first sentence of Article 92 of the Satversme (*see, for example, Judgement of 20 June 2002 by the Constitutional Court in Case No. 2001-17-0106, Para 2 of the Findings, and Judgement of 15 February 2005 in Case No. 2004-19-01, Para 6.3*). The Constitutional Court, in analysing the neutrality of court as an indispensable element of a fair trial and referring to the case law of ECHR, has recognised that the requirement of neutrality has both a subjective and an objective aspect. The court must be subjectively neutral – no judge may have personal prejudices. Whereas the

objective neutrality of court means that any valid doubts of the case participants or society about the court's objectivity should be excluded. Moreover, even semblance may be important, and even seeming biasedness should be prevented (*see Judgement of 14 May 2013 by the Constitutional Court in Case No. 2012-13-01, Para 13.2 and Para 14.2.3*). The above-mentioned findings about neutrality are equally applicable to the prosecutor's office as an institution of judicial power.

16.2. Pursuant to Section 36(1) of the Criminal Procedure Law, a prosecutor may fulfil several functions within one criminal proceedings – supervision of investigation, implementing criminal prosecution and brining public charges. The same prosecutor may perform all these functions within the framework of one criminal proceedings and in all stages thereof. Moreover, in accordance with Section 36(2) of the Criminal Procedure Law, in some cases a prosecutor adopts a decision on initiating criminal proceedings and is also conducting investigation himself. A prosecutor has the right to conduct investigative activities in criminal proceedings also as a member of an investigative group in accordance with the procedure established in Section 30 of the Criminal Procedure Law. Thus, in some cases a prosecutor conducts also investigative activities to establish, whether a criminal offence has occurred, who committed it and whether any person should be made criminally liable for it, and to obtain the necessary evidence.

Pursuant to the contested norms, it is the prosecutor, according to the location of initial examination of criminal proceedings, who has the jurisdiction to examine a person's application regarding newly disclosed circumstances. The Saeima notes that this regulation had been chosen to ensure compliance with the principle of territorial jurisdiction, because investigation of newly disclosed circumstances is linked to the location, where the criminal offence was committed (*see written reply by the Saeima, Case Materials, Vol. 2, p. 57*).

However, such regulation may cause a situation, where a person's application regarding newly disclosed circumstances is examined by the same prosecutor, who previously in the criminal proceedings conducted investigative

activities, supervised the criminal proceedings or criminal prosecution, or brought public charges. The practice of applying the contested norms confirms this. The Prosecutor's General Office notes that in some prosecutor's offices an application regarding newly disclosed circumstances is examined exactly by the same prosecutor, who had been in charge of the particular criminal case or who fulfilled the function of brining public charges (*see Opinion by the Prosecutor's General Office, Case Materials, Vol. 3, p. 69*).

16.3. The Constitutional Court has already recognised that the prosecutor, who had brought charges in the case, does not have the right to take the final decision on whether newly disclosed circumstances exist in the case (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 10 of the Findings*).

It follows from the constitutional complaint that the Applicants' application regarding newly disclosed circumstances and the complaint about the prosecutor's decision to refuse renewal of criminal proceedings in connection with newly disclosed circumstances were examined at the same prosecutor's office, the prosecutors of which in the respective criminal proceedings had conducted investigative activities as members of investigative group and also conducted criminal prosecution and brought public charges. If a prosecutor previously has conducted investigative activities and brought public charges in criminal proceedings, then he has provided an assessment and expressed and opinion on the validity of charges. Therefore valid doubts may arise that he is not going to change his opinion also when examining an application regarding newly disclosed circumstances or a person's complaint about a decision to refuse renewal of criminal proceedings in connection with newly disclosed circumstances; i.e., when deciding on the issue of renewing criminal proceedings in connection with newly disclosed circumstances. Thus, valid doubts may arise about the neutrality of the particular prosecutor.

As the Constitutional Court has already noted in its judgement in Case No. 2001-10-01, to avoid creating the impression that the prosecutor's office is not sufficiently objective, serious consideration should be given to solution of this

issue in other norms regulating criminal proceedings or Office of the Prosecutor Law (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 10 of the Findings*). However, the regulation that is currently in force does not exclude the possibility that an application regarding newly disclosed circumstances is examined by the same prosecutor, who in the respective criminal proceedings conducted investigative activities, supervised investigation, conducted criminal prosecution or brought public charges. I.e., the contested norms do not prevent, in all cases, persons', *inter alia*, the Applicants' doubts about the neutrality of prosecutors who decide on the issue of renewing criminal proceedings in connection with newly disclosed circumstances. Moreover, the Constitutional Court has repeatedly recognised that after legal norms have entered into force the legislator must *ex officio* follow, to the extent possible, whether in the practical application of law these norms, indeed, fulfil their functions effectively. If it is established that in the practical application of law the legal norms do not function, they must be improved (*see, for example, Judgement of 6 June 2012 by the Constitutional Court in Case No. 2011-21-01, Para 9, and Judgement of 10 May 2013 in Case No. 2012-16-01, Para 31.5*). Although the legal regulation on renewal of criminal proceedings in connection with newly disclosed circumstances in general is aimed at achieving a balance in the case of conflict between *res judicata* principle and a fair judgement, it is exactly the procedure established in the contested norms that in some cases fails to ensure this balance.

Thus, the procedure established by the contested norms, insofar it fails to ensure a balance in the case of a conflict between *res judicata* principle and a fair judgement, is incompatible with the first sentence of Article 92 of the Satversme.

17. Pursuant to Section 32(3) of the Constitutional Court Law, a legal norm that has been recognised by the Constitutional Court as being incompatible with a norm of higher legal force, is to be considered as being invalid as of the day when the judgement of the Constitutional Court is published, unless the Constitutional

Court has provided otherwise. This norm of the Constitutional Court Law grants to the Constitutional Court broad discretion to decide on the date, as of which a norm that has been recognised as being incompatible with a norm of higher legal force becomes invalid. In deciding on the date, as of which the contested norm becomes invalid, the rights and interests of other persons, not only those of the Applicants must be taken into consideration. Moreover, recognition of a contested norm as being invalid may not cause new violations of fundamental rights enshrined in the Satversme (*see, for example, Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25, and Judgement of 19 October 2011 in Case No. 2010-71-01, Para 26*).

In the case under review the Constitutional Court takes into consideration that recognising the contested norms as being invalid as of a past date would lead to a situation, where all decisions by prosecutors to refuse renewal of criminal proceedings in connection with newly disclosed circumstances, which have been adopted on the basis of these norms and have already entered into force, would have to be re-examined. A situation like this would be incompatible with the principle of legal certainty. Whereas immediate revoking of the contested norms, before a new regulation has entered into force, is impossible, because in such a case the Criminal Procedure Law would not define a procedure for initiating renewal of criminal proceedings in connection with newly disclosed circumstances.

In a situation like this it is necessary and admissible that the norms, which are incompatible with the Satversme, remain in force for a certain period of time (*see, for example, Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 3 of the Findings, and Judgement of 9 March 2010 in Case No. 2009-69-03, Para 16*). This would give a possibility to the legislator to adopt new legal regulation that would ensure a balance in the case of a conflict between *res judicata* principle and a fair judgement. In view of the fact that the legislator needs a reasonable period of time for adopting new regulation, in this case the contested norms cannot be revoked with a general retroactive force or be

recognised as being invalid as of the day when the judgement by the Constitutional Court enters into force.

The Constitutional Court takes into consideration also the fact that the case has been initiated on the basis of a constitutional complaint. The task of the Constitutional Court is to eliminate an infringement upon a person's fundamental rights to the extent possible (*see, for example, Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25*). If the Applicants' had no possibility to exercise the right that will be established by the new procedural regulation for initiating the procedure of renewing criminal proceedings in connection with newly disclosed circumstances, then in the particular case the doubts about the neutrality of the prosecutor, who examines an application regarding newly disclosed circumstances or a complaint about the prosecutor's decision to refuse renewal of criminal proceedings in connection with newly disclosed circumstances would not be eliminated.

Therefore the Constitutional Court notes that the new procedural regulation adopted by the legislator should eliminate doubts about the neutrality of those prosecutors, who decide on the issue of renewing criminal proceedings in connection with newly disclosed circumstances; moreover, the right to use this new procedural regulation should be granted also to the Applicants.

The Substantial Part

On the basis of Section 30-32 of the Constitutional Court Law the Constitutional Court

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to recognize the first, third and fifth part of Section 657 of the Criminal Procedure Law, insofar they allow that a prosecutor, who has conducted investigative activities in criminal proceedings, has supervised

investigation, conducted criminal prosecution or brought public charges, decides on the issue of renewing criminal proceedings in connection with newly disclosed circumstances, as being incompatible with the first sentence in Article 92 of the Satversme of the Republic of Latvia and being invalid as of 1 January 2017.

The Judgement is final and not subject to appeal.

The Judgement enters into force on the day of its publication.

Chairman of the court hearing A. Laviņš